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April 27, 2006

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APR 27 2006

Federal Communications Commission
Office of Secretary

BY HAND DELIVERY

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Core Communications, Inc.'s Petition for Forbearance
WC Docket No. __________

Dear Ms. Dortch:

Pursuant to section 160(c) of the Communication Act and section 1.53 of the Commission's rules, enclosed please find an original and four (4) copies of Core Communications, Inc.'s Petition for Forbearance from sections 251(g) and 254(g) of Communications Act and the Commission's related implementation rule.

Please date stamp the duplicate upon receipt and return it with the courier. If you have any questions or need additional information, please contact me.

Respectfully submitted,

Michael B. Hazzard /emc

Michael B. Hazzard
Counsel to Core Communications. Inc.

Enclosure

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APR 2 7 2006

Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition of Core Communications, Inc. for	)	
Forbearance under 47 U.S.C. § 160(c) from	)	WC Docket No. ______
Rate Regulation Pursuant to § 251(g) and for	)	
Forbearance from the Rate Averaging and	)	
Integration Regulation Pursuant to § 254(g)	)	

PETITION FOR FORBEARANCE
CORE COMMUNICATIONS, INC.

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Dated: April 27, 2006

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of: Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Rate Regulation Pursuant to § 251(g) and for Forbearance from the Rate Averaging and Integration Regulation Pursuant to § 254(g)	)))))))	WC Docket No. _______

PETITION FOR FORBEARANCE
CORE COMMUNICATIONS, INC.

Core Communications, Inc. ("Core"), by its undersigned attorneys and pursuant to section 10(c) of the Communications Act ("Act"), 47 U.S.C. § 160(c), and section 1.53 of the Federal Communications Commission's ("Commission's") rules, 47 C.F.R. § 1.53, hereby petitions the Commission to forbear from: (i) rate regulation preserved by section 251(g) of the Act, 47 U.S.C. § 251(g), and related implementing rules; and (ii) rate averaging and integration required by section 254(g) of the Act, 47 U.S.C. § 254(g), and related implementing rules. Core requests that the Commission apply the forbearance requested to all telecommunications carriers. Grant of this forbearance petition will subject all telecommunications carriers to section 251(b)(5) of the Act, 47 U.S.C. § 251(b)(5), for rate setting purposes. In so doing, the Commission will clear away much of the statutory and regulatory underbrush that has established and furthered regulatory arbitrage by incumbent LECs and will encourage increased competition in all areas of the nation, including rural areas.

I. INTRODUCTION AND SUMMARY

Core requests that the Commission, with respect to all telecommunications carriers, forbear from two statutory provisions of the Act, 47 U.S.C. §§ 251(g) and 254(k), and their related implementation rules.

More specifically, with respect to section 251(g), Core requests that the Commission forbear from enforcement of:

- Section 251(g) of the Act, and related implementing rules, to the extent they apply to or regulate the rate for compensation for switched "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,"[1] pursuant to state and federal access charge rules; and

- Any limitation, by FCC rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched access charges.[2]

With respect to section 254(g), Core requests that Commission forbear from that statutory provision, and its implementing rules related to rate averaging or integration.[3]

Nearly 10 years ago, the Commission recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network

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1 47 U.S.C. § 251(g).

2 *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, 9168 (rel. Apr. 27, 2001) ("*ISP Remand Order*"), *rev'd on other grounds and remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003). On July 14, 2003, Core petitioned for forbearance from the *ISP Remand Order*. Because the Commission failed to act to deny Core's request forbearance, Core's petition was deemed granted and the *ISP Remand Order* was eliminated through forbearance on October 11, 2004. This issue is pending before the Court of Appeals for the District of Columbia Circuit, *In re: Core Communications, Inc.*, Nos. 04-1368 *et al.* (oral argument held Oct. 27, 2005).

3 Similarly, Core will refer to its request for forbearance from section 254(g) and its implementing rules as "254(g) Forbearance."

functions."[4] Accordingly, the Commission noted its belief "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."[5] A decade later, however, rate convergence has not happened, and the reason is simple: section 251(g) and 254(g) of the Act and the related implementing rules enable carriers, most notably incumbent LECs, to engage in regulatory arbitrage to collect above-cost intercarrier compensation rates and pay below-cost intercarrier compensation rates.

There can be no doubt that eliminating regulatory arbitrage and implicit subsidies serves the public interest.[6] Moreover, eliminating regulatory arbitrage and implicit subsidies promotes competition.[7] Maintaining regulatory requirements that codify regulatory arbitrage and implicit subsidies is not necessary to ensure carrier charges and practices are just, reasonable, and nondiscriminatory.[8] Nor is maintaining regulatory arbitrage and implicit subsidies necessary to protect consumers.[9] Accordingly, the Commission must grant Core's petition and provide section 251(g) Forbearance and section 254(g) Forbearance.

II. THE RISE OF REGULATORY ARBITRAGE AND THE COMMISSION'S INABILITY TO COMBAT IT

Since the passage of the 1996 amendments to the Act, the Commission has repeatedly found that the cost of terminating traffic does not vary by type of traffic (*e.g.*, wireless, wireline, ISP) or by jurisdiction (*e.g.*, local, intrastate, interstate). Yet, in spite of this economic

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4 First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications* Act of th e1996, 11 FCC Rcd 15449, ¶ 1033 ("*Local Competition First Report and Order*") (subsequent history omitted).

5 *Id.*

6 47 U.S.C. § 160(a)(3).

7 *Id.*, § 160(b).

8 *Id.*, § 160(a)(2).

9 *Id.*, § 160(a)(1).

fact, the Commission repeatedly has been bullied by incumbent LECs to establish regulations that, while appearing facially neutral, have the clear effect of enabling incumbent LECs to collect high intercarrier compensation rates and pay low intercarrier compensation rates. This, in spite of what incumbent LECs say, is *actual* regulatory arbitrage. Even though the Commission recognizes that reform is desperately needed, the overwhelming strength of the rural LEC and Bell Operating Company lobbies makes reform next to impossible, which is why forbearance is such an appropriate tool. The Commission can affirmatively grant Core's request or let it take effect through operation of Congress' statutory remedy. Either way, the result is the same: telecommunications traffic within the FCC's jurisdiction will fall under section 251(b)(5), and rate unification will be readily achievable.

A. Regulatory Arbitrage under the 1996 Act

In the 1996 Act, Congress established a "reciprocal compensation" obligation that applies to all "local exchange carriers" and all "telecommunications."[10] Section 251(g) always has been viewed as a means of carving out certain traffic streams on a transitional basis,[11] and section 254(g) has served as a means of preserving implicit subsidies for certain LECs, most notably rural LECs with high access charges.

During the Commission's original implementing proceedings, Bell Atlantic described the parameters of reciprocal compensation as follows:

> The Act also imposes a duty on all local exchange carriers – incumbents and new entrants alike – to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications.
>
> * * *

10 47 U.S.C. § 251(b)(5).

11 *ISP Remand Order* at 9166, 9167. There the Commission stated that 251(g) is a "carve-out provision," which creates a subset of traffic "that falls within subsection [251](b)(5)."

> Specifically, the Act provides that a state commission shall not consider arrangements to be just and reasonable unless they provide for the mutual and reciprocal recovery by each carrier of the additional costs incurred to terminate calls that originate on the other carrier's network.... Precisely because these arrangements are reciprocal, however, and each party must pay the other reciprocal rates, the Act establishes only a minimum, and leaves it to the parties to determine the price above this minimum.
>
> The Act also permits a limited exception to this general rule. The pricing standard does not "preclude" arrangements between parties that allow the recovery of costs through the "offsetting reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements.) [Citation omitted]. By its very terms, this provision creates an exception to the right to recover the costs of transporting and terminating calls only where the parties voluntarily waive this right.... [The Act] does not, however permit arrangements such as bill and keep to be imposed by regulatory mandate, whether in the context of an arbitration or as an interim measures.
>
> * * *
>
> Nor would mandating bill and keep make sense from an economic or policy standpoint, even if such mandatory arrangements were not already forbidden by the Act and the Constitution. Mandating bill and keep would force LECs to terminate calls on their networks at a zero rate that is unquestionably below cost. This would create a subsidy for competing providers ... who by no stretch of the imagination are in need of one. It would do so, moreover, at a time that Congress has directed the Commission to eliminate hidden subsidies, and would force the LECs' other customers to bear the cost of this subsidy. And because bill and keep frees a competing provider from any accountability for the costs it imposes on the incumbent LEC, bill and keep eliminates any incentive to use the LECs' termination service efficiently and will lead to economically wasteful behavior....[12]

To summarize, Bell Atlantic agreed that the Act requires that rates for intercarrier compensation must be reciprocal, symmetrical, and set by the state commissions under the Act. Moreover,

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12 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of Bell Atlantic at 40-42 (May 16, 1996) (internal citations omitted).

although parties may voluntarily agree to a compensation rate of zero, such a rate may not be mandated under the Act.

In its subsequent reply comments, Bell Atlantic further elaborated on its position. Foremost, Bell Atlantic noted that "[t]he most blatant example of a plea for a government hand out comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, ... euphemistically referred to as 'bill and keep.'"[13] Bell Atlantic continued that a "more appropriate name ... would be '<u>bilk</u> and keep,' since it will bilk the LECs' customers out of their money in order to subsidize"[14] other carriers.

Furthermore, elaborating on the economic incentives created by its proposal to the Commission, Bell Atlantic clarified:

> [T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are **predominantly inbound**, such as credit card authorization centers and internet access providers. **The LEC would find itself writing large monthly checks to the new entrant**. By the same token, setting rates too low will merely encourage new entrants to sign up customers whose calls are **predominantly outbound**, such as telephone solicitors. Ironically, under these circumstances, the LECs' current customers not only would subsidize entry by competitors, but would subsidize low rates for business they may well not want to hear from.[15]

Bell Atlantic's overarching point could not have been more clear – setting the correct, symmetrical rate level is key. If a termination rate is set too high, carriers will be incented to focus on termination services. If a termination rate is set too low, carriers will be incented to

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[13] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Bell Atlantic at 20 (May 30, 1996).

[14] *Id.* (emphasis original).

[15] *Id.* at 21 (emphasis added). Of course, nothing prohibits Bell Atlantic, Verizon, or any other carrier from serving credit card authorization companies or Internet service providers.

focus on origination services. The best rate would be one that makes a carrier indifferent as to whether it: (i) terminates traffic itself or sends traffic to another carrier for termination and (ii) serves customers that disproportionately terminate or originate traffic.

1. The 1996 Local Competition First Report and Order

In accordance with the statutory mandate, the Commission released its first rules implementing sections 251 and 252 of the 1996 Act on August 8, 1996. Although many items in the *Local Competition First Report and Order* were controversial and some were ultimately overturned through subsequent legal action, the reciprocal compensation rules promulgated by the Commission were largely supported by the industry.

At the outset, the Commission recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions."[16] Accordingly, the Commission noted its belief "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."[17]

Largely following the conceptual analysis contained in Bell Atlantic's comments and reply comments, and supported by many others, the FCC adopted symmetrical reciprocal compensation rate structures based on the incumbent LEC's forward looking cost. In doing so, the Commission concluded that "using the incumbent LEC's forward-looking costs for the transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers

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16 *Id.* at ¶ 1033.

17 *Id.*

satisfies the requirement of section 252(d)(2) that costs be determined 'on the basis of a reasonable approximation of the additional cost of terminating such calls.'"[18]

As the Commission explained, a "symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs."[19] Moreover, by making the rates symmetrical, the Commission noted that it would equalize bargaining strength among providers by making all carriers "pay the same rates for reciprocal compensation."[20]

2. The 1996 Geographic Rate Averaging Order

In section 254(g), Congress codified the Commission's pre-existing geographic rate averaging and rate integration policies.[21] The Commission implemented section 254(g) by adopting two requirements.[22] First, the Commission required providers of interexchange telecommunications services to charge rates in rural and high-cost areas that are no higher than the rates they charge in urban areas.[23] This is known as the geographic rate averaging rule. Second, providers of interexchange telecommunications services are required to charge rates in each state that are no higher than those in any other state.[24] This is known as the rate integration rule.

In the *Geographic Rate Averaging Order*, the Commission explained that geographic rate averaging benefits rural areas by providing access to a nationwide

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18 *Id.* at ¶ 1085 (citation omitted).

19 *Id.* at ¶ 1086.

20 *Id.* at ¶ 1087.

21 *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564, 9566-67, ¶¶ 3-5, 9568–69, ¶ 9 *("Geographic Rate Averaging Order")* (citing S. Rep. No. 230, 104th Cong., 2d Sess. 1) (1996)).

22 *Id.* at 9565-66, ¶ 2.

23 *Id.*, 9568-69, ¶ 9, 9574, ¶ 20.

24 *Id.*, at 9588, ¶ 52.

telecommunications network at rates that do not reflect the disproportionate burdens that may be associated with recovery of common line costs in rural areas.[25] In other words, this rule creates an implicit subsidy from interexchage carriers to LECs, which leads to artificially low retail rates that act as a disincentive to competitive entry and the deployment of advanced technology. Under the Commission's rate averaging and rate integration requirements, IXCs bear the burden of averaging on a nationwide basis the vastly different per-minute switched access rates charged by LECs, which get to maintain high access rates without having to flow costs through to their customers.

The rate averaging and integration rules codify regulatory arbitrage and implicit subsidies flowing from customers in low-cost areas served by IXCs to customers in high-cost service areas. Armed with this subsidy, LECs are free to charge below-cost rates, precluding competition and innovation. This is classic regulatory arbitrage, as IXCs are forced by regulation to pay above-cost rates for termination and are similarly precluded from passing these costs onto their retail customers because they must "average" their rates.

3. The 1999 Declaratory Ruling and Bell Atlantic Tel. Cos.

Not long after the adoption the *Local Competition First Report and Order*, the FCC began chipping away at the fundamental – and lawful – principles it had established in its initial implementation proceeding. Although Bell Atlantic had specifically anticipated that competitors would target "customers whose calls are predominantly inbound, such as ... internet access providers" if reciprocal compensation rates were set too high, Bell Atlantic agreed to

[25] *Id.*, ¶ 6.

relatively high rates but then sought to avoid "writing large checks to … new entrant[s]."[26] Indeed, instead of symmetrically reducing rates for all traffic, the incumbent LECs sought to lower (if not eliminate) the rate that competitors could charge for terminating ISP-bound traffic and at the same time to maintain high rates for the types of traffic terminated by the incumbent LECs.

As a result of an intense incumbent LEC lobbying effort, the FCC specifically reconsidered reciprocal compensation for ISP-bound traffic, holding that calls terminated to ISPs do not constitute compensable local telecommunications.[27] In reaching this result, the Commission adopted a so-called "end-to-end" analysis to move ISP-bound traffic from the intrastate jurisdiction into the interstate jurisdiction, and therefore outside of sections 251 and 252. Analogizing to voicemail calls, the Commission stated that the "communications at issue here do not terminate at the ISP's local server … but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."[28] Of course, this finding contradicted the Commission's then- and still-existing definition of termination, which involves switching traffic at the end office and delivering that traffic to the end user's premises.[29] ISPs are end users.[30]

26 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Bell Atlantic at 20 (May 30, 1996).

27 Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd. 3689, 3697 (1999) ("*Declaratory Ruling*"), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

28 *Declaratory Ruling*, 14 FCC Rcd. at 3697.

29 47 C.F.R. § 51.701(d).

30 *See, e.g., Bell Atlantic Tel. Cos. v. FCC,* 206 F.3d 1, 6 (D.C. Cir. 2000).

In reaction to the *Declaratory Ruling*, Commissioner Harold Furchtgott-Roth issued a separate press release[31] stating that the *Declaratory Ruling* violated the Act and would inappropriately result in disrupting numerous state commission decisions on intercarrier compensation. In addition, Commissioner Furchtgott-Roth noted that the FCC's new reliance on a so-called "end-to-end" analysis for ISP-bound calls was inconsistent with previous Commission precedent and advocacy relied upon by U.S. Court of Appeals for the Eighth Circuit.[32]

On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated and remanded the *Declaratory Ruling*.[33] First, following some of the criticisms in Commissioner Furchtgott-Roth's separate press release, the Court rejected the FCC's use of the "end-to-end" analysis, concluding that the Commission "ha[d] yet to … provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model … or the long distance call model."[34] The Court went on to note that ISP-bound calls are "switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'"[35] Indeed, on this basis, the Court noted that an ISP is "no different from many business,

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31 As a technical matter, Commissioner Furchtgott-Roth did not vote on the *Declaratory Ruling*. As noted in the press release, Commissioner Furchtgott-Roth "did not participate … in protest of this action and over the denial of his process rights within the agency." The press release went on to state that Commissioner Furchtgott-Roth's request "to postpone … [a vote on the *Declaratory Ruling*] for three weeks so that the serious ramifications of the proposed action could be discussed further" was denied.

32 *See Southwestern Bell Telephone Co. v. FCC*, 153 F.3 523, 542 (1998).

33 *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

34 *Id.* at 5.

35 *Id.* at 6.

such as 'pizza delivery firms,'" which receive disproportionately in-bound calls as part of their business.[36]

Separately, the Court rejected the FCC's effort to classify ISP-bound traffic as "interstate access" on grounds that no such category exists in the statute.[37] For purposes of the remand, the Court directed the FCC to explain, among other things, "why [ISP-bound] traffic is 'exchange access' rather than 'telephone exchange service,'"[38] since that was the dichotomy previously established by the FCC.

4. The 2001 ISP Remand Order and WorldCom

Following the D.C. Circuit's decision in *Bell Atlantic*, the Commission released the *ISP Remand Order* in April 2001. Although designed to address the remand, the FCC never answered the questions posed by the *Bell Atlantic* Court. Instead, the FCC shifted course and found for the first time that ISP-bound traffic is interstate "information access" traffic pursuant to section 251(g) of the Act, and accordingly subject to the Commission's jurisdiction under section 201 of the Act. After asserting jurisdiction pursuant to sections 201 and 251(g), the Commission preempted state commissions from regulating the rate for ISP-bound traffic, and established an "interim regime" that, among other things, set forth a rate cap, a growth cap, a rule precluding carriers from obtaining any compensation in "new markets," and a presumptive test for identifying ISP-bound traffic.[39]

At the same time the Commission hindered the ability of competitors to recover part of their network costs through terminating compensation, the Commission expressly

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36 *Id.* at 7.

37 *Id.* at 9.

38 *Id.*

39 *See ISP Remand Order* at 9187-89.

recognized that the cost of terminating an ISP-bound call is no different than that of any other type of call. Specifically, the Commission concluded that "a [local exchange carrier] generally will incur the same costs when delivering a call to a local end user as it does delivering a call to an ISP."[40] Indeed, the Commission went so far as to state that "the record developed in response to the Intercarrier Compensation NPRM and the Public Notice fail[ed] to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP."[41] In spite of these findings of fact, the Commission again broke with the key principles established in the *Local Competition First Report and Order* for the purpose of greatly limiting intercarrier compensation for ISP-bound traffic (focused on by competitive carriers) while preserving significantly high intercarrier compensation rates for voice traffic (focused on by incumbent carriers).

In a lengthy and detailed dissent, Commissioner Furchtgott-Roth again criticized the Commission for failing to follow Congress' directives as set forth in the Act. The *ISP Remand Order*, Commissioner Furchtgott-Roth stated, "is the product of a flawed decisionmaking process that occurs all too frequently in [the] agency."[42] Rather than follow the statute, "the Commission settles on a desired outcome based on what it thinks is good 'policy' and without giving a thought to whether that outcome is legally supportable."[43] Next, the Commission "slaps together a statutory analysis" and "[t]he result is an order like [the *ISP*

40 *Id.* at 9194.
41 *Id.*
42 *Id.* at 9215 (Dissenting Statement of Commissioner Furchtgott-Roth).
43 *Id.*

Remand Order], inconsistent with the Commission's precedent and fraught with legal difficulties."[44]

As for the future of the *ISP Remand Order*, Commissioner Furchtgott-Roth predicted as follows:

> The result will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years. In the meantime, the uncertainty that has clouded the issue of compensation for ISP-bound traffic for the last five years will continue. The Commission would act far more responsibly if it simply recognized that ISP-bound traffic comes within section 251(b)(5). To be sure, this conclusion would mean that the Commission could not impose on these communications any rule that it makes up, as the agency believes it is permitted to do so under section 201(b). Rather the Commission would be forced to work within the confines of sections 251(b)(5) and 252(d)(2), which, among other things, grant authority to the State commissions to decide on "just and reasonable" rates for reciprocal compensation.[45]

At bottom, Commissioner Furchtgott-Roth recognized that only by following the statutory scheme is it possible for the Commission to avoid the regulatory uncertainty the inevitably results from outcome-oriented decisions.

Further litigation indeed ensued. In the subsequent *WorldCom* case, the D.C. Circuit remanded (but did not vacate) the *ISP Remand Order* back to the Commission for a third attempt to adopt intercarrier compensation rules consistent with the Act. The *WorldCom* court rejected outright the Commission's effort to classify ISP-bound traffic as "information access" under section 251(g). The Court noted that 251(g) "does not provide a basis for the Commission's action"[46] and that adoption of the Commission's construction of 251(g) would

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44 *Id.*

45 *Id.* at 9215-16.

46 *WorldCom,* 288 F.3d at 434.

enable the FCC to "override virtually any provision of the 1996 Act."[47] Litigation arising under the *ISP Remand Order* continues to this day, and to date, the Commission has not responded to the *WorldCom* remand.

B. The Commission's Effort to Unify Intercarrier Compensation Regimes

In its February 10, 2005 press release announcing the adoption of the FNPRM, the FCC stated that any intercarrier compensation reform should:

- Encourage the development of efficient competition and the efficient use of and investment in telecommunications networks;
- Preserve universal service support, which ensures affordable rates for consumers living in rural and high-cost areas;
- Create a technologically and competitively neutral system that can accommodate continuing change in the marketplace, provide regulatory certainty and not impede novel technology; and
- Require minimal regulatory intervention and enforcement.[48]

Core agrees with these goals, but notes that the power of the existing regime, which codifies regulatory arbitrage, has foreclosed the Commission from taking any affirmative steps to reach these goals.

As noted above, relying upon sections 251(g) and 254(g), a number of Commission orders have yielded a convoluted and broken intercarrier compensation system that codifies regulatory arbitrage to protect certain carriers and penalize others. The Commission, at least implicitly, recognized as much in adopting in February 2005 a Further Notice of Proposed Rulemaking to unify the disparate intercarrier compensation mechanisms.

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47 *Id.* at 433.

48 *FCC Acts to Eliminate Outmoded Intercarrier Compensation Rules*, News Release (Feb. 10, 2005).

In its FNPRM, the Commission described existing intercarrier compensation difficulties as emanating largely from the disparate jurisdictional classifications and rates levels for providing essentially similar functionality – *i.e.*, traffic termination.[49] "[E]xisting compensation regimes," the FCC stated, "are based on jurisdictional and regulatory distinctions that are not tied to economic or technical differences between services."[50] Indeed, the Intercarrier Compensation Forum, has identified no fewer than ten (10) different possible classifications for traffic termination. Regulatory arbitrage, the Commission agreed, arises from enabling carriers to collect and pay materially different rates for the same functionality.[51] In such a system, carriers are incented to arbitrage the rules to collect high rates for themselves but pay low rates to others.

The current patchwork system of jurisdictional classifications, the Commission noted, "require[s] carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis."[52] Core could not agree more, and granting the relief requested in this forbearance petition would enable the Commission to unify intercarrier compensation rates and eliminate implicit subsidies associated with rate averaging and integration requirements.

Technological alternatives to traditional telephony services, such as wireless and VoIP services, are not tied to a geographic location, and accordingly make regulatory distinctions based on jurisdiction meaningless. As the Commission noted in the FNPRM, number portability

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49 *See, e.g.*, FNPRM at ¶¶ 15-17.
50 *Id.* at ¶ 15.
51 *Id.*
52 *Id.*

and other means of encouraging intermodal competition complicates geographic analysis.[53] In a world of intermodal competition, however, why should an interstate, intraMTA call from a wireless network to a wireline network cost any different than an interstate, interLATA call between two wireline networks? No particular economic or social purpose is served by such a distinction.

If all carriers receive the same rate for terminating traffic, it simply won't matter whether that traffic is categorized as "interstate," "intrastate," "ISP," "local," "long distance," "toll," "interLATA," "intraLATA," "CMRS," "interMTA," intraMTA," "FX," "V-FX," "VNXX," or something else.[54] Regardless of how traffic is classified today, the terminating carrier is providing the same functionality and should be compensated accordingly.

III. SECTION 251(G) FORBEARANCE AND SECTION 254(G) FORBEARANCE ARE CONSISTENT WITH THE STANDARDS SET FORTH IN SECTION 160

Under the Act, the Commission shall forbear from applying any regulation or provision of the Act to a telecommunications carrier or telecommunications service, or class of carriers or services, in any or some of its or their geographic markets, if it determines that:

- enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably

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53 Indeed, carriers rarely if ever use actual geographic end points for call rating. The standard industry practice is to rate calls based on telephone numbers. As the Commission has found (and supported), carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call. *See Starpower Communications, LLC v. Verizon South Inc.*, EB-00-MD-19, Memorandum Opinion and Order, 18 FCC Rcd 23625, 23633, ¶ 17 (2003); *see also* FNPRM at ¶ 22 n.59.

54 Core lists these terms to give a flavor of the complexity that exists in the current system, or set of systems, and the related advocacy positions of various parties. These terms are not exhaustive, many of them overlap with one another, and some never have been recognized by any body of competent jurisdiction.

discriminatory;[55]

- enforcement of such regulation or provision is not necessary for the protection of consumers;[56] and

- forbearance from applying such provision or regulation is consistent with the public interest.[57]

As demonstrated herein, the request 251(g) Forbearance and 254(g) Forbearance satisfies the criteria set forth in section 10(a)

A. Section 251(g) Forbearance Satisfies the Statutory Standard

In the 1996 Act, Congress adopted section 251(b)(5) which, on its face, applies to all telecommunications. As noted above, however, Congress "carved out" access traffic from the scope of section 251(b)(5).[58] In the *Local Competition First Report and Order*, the Commission found that the section 251(g) carve-out includes access services.[59] Based on this statement in the *Local Competition First Report and Order* and other FCC orders, such as the *ISP Remand Order*, grant of the requested 251(g) Forbearance would default traffic into section 251(b)(5).[60] Eliminating the 251(g) carve-out and consolidating telecommunications traffic in 251(b)(5) for intercarrier compensation purpose satisfies section 10's forbearance standard.

Enforcing 251(g) and its related price regulations is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unreasonably

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55 47 U.S.C. § 160(a)(1).

56 *Id.* § 160(a)(2)

57 *Id.* § 160(a)(3). In considering this public interest prong, section 10(b) directs the Commission to consider whether grant of forbearance "will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b).

58 47 U.S.C. § 251(g).

59 *Local Competition First Report and Order*, 11 FCC Rcd at 15869, ¶ 732.

60 *ISP Remand Order*, ¶¶ 31-37.

discriminatory."[61] Indeed, the exact opposite is true. Maintaining section 251(g) creates regulatory arbitrage by maintaining vastly disparate rates for identical functionality for no economic reason. Rather, 251(g) is a tool for regulatory price discrimination and only by eliminating it will the Commission be able to assure that rates "are just and reasonable and not unreasonably discriminatory." Accordingly, Core's 251(g) Forbearance request satisfies section 10(a)(1).

Enforcing section 251(g) and it pricing regulations is not necessary for the protection of consumers. Maintaining widely disparate intercarrier compensation rates for otherwise identical functionality harms consumers and does not protect them by creating implicit subsidies for certain technologies based not on economics, but on arbitrary regulatory distinctions. Eliminating regulatory arbitrage codified by section 251(g) will even the playing field among telecommunications providers, and result in consumer benefit by eliminating subsidies to certain carriers and technologies based on regulatory fictions, and instead allow consumers to make service and technology choices based on the real economics of an offering. Thus, Core's 251(g) Forbearance request satisfies section 10(a)(2).

Finally, Core's 251(g) Forbearance request is consistent with the public interest and will promote competition by providing the Commission a vehicle to unify intercarrier compensation rates, which is the stated Commission goal. Section 251(g) and its related rate regulations have been the primary sources of intercarrier compensation regulatory arbitrage, and by granting Core's section 251(g) Forbearance request, the Commission would greatly reduce regulatory arbitrage and promote competition by leveling the intercarrier compensation playing

61 47 U.S.C. § 160(a)(1).

field. Without question, then, grant of Core's section 251(g) Forbearance request would further the public interest and promote competition, consistent with section 10(a)(3) and 10(b).

B. Section 254(g) Forbearance Satisfies the Statutory Standard

The Commission also should forbear from section 254(g) and its related implementing rules. As noted above, section 254(g) requires rate averaging and integration that creates implicit subsidies for rural carriers and rural consumers at the expense of carriers providing long distance service to non-rural consumers. These subsidies are unnecessary, unwise, and contrary to the public interest and competition as they eliminate the incentive to innovate and stifle the deployment of new technologies and competitive offerings.

Enforcement of section 254(g) and its related rate integration and averaging regulations is not "necessary" to ensure that interstate, interexchange rates are just and reasonable or unreasonably discriminatory. The interstate, interexchange business is notoriously competitive, and even in the most remote area, carriers cannot expect to charge rates that are unjust, unreasonable, or discriminatory because a competitor will rapidly take business away by responding to consumer demands for service. There can be no doubt that the competitive nature of the interstate, interexchange market place is sufficient to prevent unreasonable discrimination, and therefore, grant of the requested 254(g) Forbearance satisfies section 10(a).

Similarly, enforcement of section 254(g) and its related rate integration and averaging regulations is not "necessary" for the protection of consumers. By any measure, the interstate, interexchange marketplace is fiercely competitive. The ability of customers to churn from one interexchange carrier to another is well known. Any customer that feels they are being treated unfairly by there carrier can (and will) switch providers. In fact, eliminating the implicit subsidies bestowed upon certain incumbent LECs through 254(g) will even the playing field among telecommunications providers, encourage market entry and facilities deployment by competitors, and ultimately result in consumer benefit by allowing consumers to make service and technology choices based on the real economics of an offering. As a result, Core's 254(g) Forbearance request satisfies section 10(a)(2).

Finally, eliminating the implicit subsidies and regulatory arbitrage created by section 254(g) would further the public interest and promote competition. The rate averaging and integration regulations require IXCs to pay inflated access charges and provides no means for passing them on directly to consumers. As a result, incumbent LECs have created an originating/terminating cartel by geographic area, which greatly limits the ability of the market to compete intercarrier compensation charges to a cost based rate, which harms the public interest and competition. Furthermore, the can be no doubt that the rate averaging and integration rules create an implicit subsidy for rural and high cost LECs. Even if the Commission were to determine that some subsidy is warranted, which it is not, the answer is to make such subsidies explicit through universal service, rather than bake an implicit subsidy into intercarrier compensation rates, which serves only to overtax interexchange carriers and consumers in non-rural areas. Thus, grant of Core's Section 254(g) Forbearance request would further the public interest and promote competition, consistent with section 10(a)(3) and 10(b).

IV. CONCLUSION

Consistent with the foregoing, the Commission should grant the requested 251(g) Forbearance and 254(g) forbearance as between all telecommunication carrier as soon as reasonable practicable to eliminate regulatory arbitrage and unify intercarrier compensation rates.

Respectfully submitted,

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